IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.489 OF 2004

Ramdhani Shivnath Yadav & ors. ... Appellants.
Versus.
M/s.Mulraj Khatau & Sons Ltd. ... Respondents.

Shri B.B.Parekh for the Appellants.

Shri V.J.Shah i/by M/s.Kanga & Co. for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 3rd May, 2005.

P.C.:

1. Admit. The Respondents waive service. Taken out for hearing forthwith.

2. The Appeal from Order is preferred by the original Defendant for challenging the Judgment and Order dated 22nd March 2004 passed by the Appellate Court in the Notice of Motion No.5038 of 2003. The said Notice of Motion was taken out under the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908. The learned trial Judge rejected the Notice of Motion by holding that the decree passed in the suit was not an exparte decree and therefore, Notice of Motion taken out under Order IX Rule 13 of the said Code was not maintainable. The learned trial Judge held that the only remedy available to the Appellant was to prefer an appeal against the decree.

3. After arguing the Appeal for sometime, the learned Counsel appearing for the Respondent stated that the Notice of Motion taken out by the Appellant was otherwise maintainable under Order IX Rule 13 of the Code as decree passed is an exparte decree within the meaning of Order IX of the Code. He, however, submitted that there is a delay in taking out the Notice of Motion and no sufficient cause is made out for setting aside the decree. He, therefore, submitted that the Notice of Motion may be remanded to the trial Court for hearing the same afresh. The submission made by the learned Counsel for the Respondents is reasonable.

4. In view of this, the following order is passed:

(i) The impugned Judgment and Order dated 22nd March 2004 is quashed and set aside and the Notice of Motion No.5038 of 2003 is restored to file. It is made clear that the Notice of Motion taken out by invoking the provisions of Order IX Rule 13 of the said Code is maintainable as decree passed in S.C.Suit No.3150 of 12984 is an exparte decree within the meaning of Order IX of the said Code.

(ii) Parties will appear before the before the learned trial Judge on 20th June 2005 for fixing the date of hearing of the Notice of

Motion. The learned trial Judge will hear and decide the Notice of Motion expeditiously.

(iii) All contentions of the parties on merits of the Notice of Motion, save and except the issue regarding maintainability of the Notice of Motion are expressly kept open.

(iv) The Appeal from Order is partly allowed in the above terms with no order as to costs.

(v) The parties and the concerned Court to act n authenticated copy of the order.

Judge.